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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

Case No. ——

GEORGE LANG,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE

PRELIMINARY STATEMENT

The petitioner, George Lang, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Tennessee entered on March 3, 1970, and the judgment of the Supreme Court of Tennessee, entered on August 3, 1970.

In th Circuit Court of Madison County, Tennessee, Case No. 5160, the petitioner was indicted by the Grand Jury on September 4, 1968, on a charge of contributing to or encouraging the delinquency of two children under the age of eighteen years by showing them obscene booklets in violation of Section 37-270 of the Tennessee Code Annoted. The case was tried in the Circuit Court of Madison County, Tennessee, before a jury, on September 30,

1968, upon defendant's plea of not-guilty. The jury found the defendant guilty as charged and assessed his punishment at a fine of $1,000.00 and eleven months, 29 days in the Madison County jail. The Circuit Court of Madison County, Tennessee, entered judgment accordingly.

On October 29, 1968, the defendant filed a motion for a new trial, which was overruled and disallowed by the Trial Court on March 31, 1969.

The defendant perfected his appeal to the Circuit Court of Criminal Appeals and duly filed his assignments of error, brief and argument. All of the questions presented in this petition were presented upon this appeal. On March 3, 1970, the Tennessee Court of Criminal Appeals affirmed the judgment of the Trial Court and decided all of the questions now presented adversely to the defendant. All of defendant's assignments of error were overruled.

The defendant then duly filed a petition for certiorari with the Supreme Court of Tennessee, which is the highest Court of the State of Tennessee in which a decision could be had, seeking a review of the decision of the Court of Criminal Appeals. Certiorari is the only method by which such a review can be accomplished. All of the questions now presented in this petition were presented to the Supreme Court of the State of Tennessee by defendant's petition for certiorari. On August 3, 1970, the Supreme Court of the State of Tennessee denied certiorari without written opinion.

Petitioner has now exhausted all of his remedies through the Appellate Courts of Tennessee. He submits that his rights and privileges under the Constitution of the United States have been denied him by the Courts of Tennessee, and he files this petition as his only remaining remedy.

OPINIONS AND JUDGMENTS OF THE COURTS OF TENNESSEE

The opinion of the Court of Criminal Appeals of Tennessee is appended as Exhibit A to this petition. To defendant's knowledge, this opinion is not reported. The Trial Court rendered no written opinion. The Supreme Court of Tennessee denied certiorari without opinion.

The judgments of the Court of Criminal Appeals of Tennessee is appended as Exhibit B and the judgment of the Supreme Court of Tennessee denying certiorari is appended as Exhibit C to this petition.

JURISDICTION

The petitioner prays that this Court review the judgment of the Court of Criminal Appeals of Tennessee, dated March 23, 1970, overruling defendant's assignments of error and affirming the Trial Court's conviction of the petitioner and that this Court review the judgment of the Supreme Court of Tennessee denying certiorari and refusing to review the judgment of the Court of Criminal Appeals, said Supreme Court judgment being entered on August 3, 1970.

The statutory provision believed to confer on this Court jurisdiction to review these judgments is 28 United States Code, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the defendant enjoyed his right to a trial by an impartial jury when, (a) all of the jurors who served had heard of defendant, who had something less than a good reputation; (b) four of the jurors who served had

previous knowledge or had previously heard that defendant had been convicted before; (c) seven of the jurors who served had previous knowledge or had previously heard that a few weeks prior to the trial, defendant's home had been searched, "obscene" material seized and that, consequently, defendant was arrested and charged, said search, seizure, arrest and charge being wholly unrelated to the case on trial. The defendant says that he did not have a trial by an impartial jury, to which he is entitled under the 6th and 14th Amendments to the Constitution of the United States.

II.

Whether the defendant had a right to have his counsel conduct voir dire examination of prospective jurors separately and out of the presence of each other when the examination would necessarily relate to matters such as exposure of prospective jurors to prejudicial pretrial publicity, notoriety and talk, and to knowledge of defendant's prior conviction and to knowledge of other and unrelated moral charges against the defendant, and when the examination of one juror in the presence of the others would expose the others to highly prejudicial and inflammatory matter. Defendant says that he did have such a right under the 6th and 14th Amendments to the Constitution of the United States and that this right was denied him because the Trial Court required voir dire examination to be conducted in the presence of all jurors and prospective jurors, much to the defendant's prejudice.

III.

Whether the defendant was entitled to a change of venue in view of highly prejudicial pretrial publicity around Madison County, Tennessee, occurring shortly before the

trial and consisting of approximately ten newspaper articles, sixty-eight radio broadcasts, twelve to twenty-four telecasts, and an unusual amount of notoriety and talk, the effects of which were clearly evidenced by the results of voir dire examination of jurors as pointed out in Question I above and Statement of Facts below. Defendant says that his Motion for Change of Venue should have been granted.

IV.

Whether, upon affidavit of a police officer made upon information that defendant had shown "obscene" booklets to two young girls, a search warrant could be lawfully issued and, pursuant thereto, a search of defendant's home and seizure therefrom of allegedly "obscene" material, be lawfully carried out without a hearing upon the "obscene" issue being conducted prior to the issuance of the warrant and the execution of the search and seizure and without any prior notice to the defendant. Defendant says that this search and seizure violated his constitutional rights under the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and was in violation of Tennessee statutory law.

V.

Whether a search warrant authorizing and directing the search of defendant's home for and seizure of obscene "still pictures and books" issued upon a police officer's affidavit made upon information that defendant had shown "obscene booklets to two young girls, which warrant left it to police officers to determine what pictures and books were obscene, described the material to be seized sufficiently so as to safeguard defendant's rights under the First, Fourth and Fourteenth Amendments to the Consti-

tution of the United States. The defendant says that the description of the material to be seized as obscene "still pictures and books" was insufficient and did not describe the material with reasonable certainty and, as a result, his rights were not safeguarded.

VI.

Whether the defendant, when being tried upon charges of contributing to or encouraging the delinquency of children under eighteen years of age by showing them obscene booklets, was denied due process by the Tennessee Courts in allowing the State to bring out on cross-examination of defendant that he (defendant) had a number of nude pictures displayed in his home, a matter wholly unrelated to the case on trial, when the only purpose and effect of such examination could be to create prejudice in the minds of the jury against the defendant. The defendant says that the Tennessee Courts, in allowing such cross examination, have denied him due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VII.

Whether the defendant when being tried upon charges of contributing to or encouraging the delinquency of children under eighteen years of age by showing them obscene booklets, was denied due process by the Tennessee Courts in allowing the State upon cross-examination to inquire of defendant as to whether he (defendant) had been previously convicted of contributing to the delinquency of a minor and in allowing the fact that defendant had been so convicted to be brought to the attention of the jury, said prior conviction being a misdemeanor, not necessarily

involving moral turpitude and wholly unrelated to the case on trial, when the only purpose and effect of such inquiry could be to create prejudice in the minds of the jury against the defendant. The defendant says that the Tennessee Courts, in allowing such cross-examination, and allowing defendant's prior conviction to be brought to the attention of the jury, have denied him due process and equal protection in violation of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Questions I, II, and III

6th Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

14th Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions IV and V

1st Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

4th Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable causes, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

14th Amendment to the Constitution of the United States: (Quoted above)

Questions VI and VII

14th Amendment to the Constitution of the United States: (Quoted above)

STATEMENT OF THE CASE

(a) Facts Primarily Material to Questions I, II and III. (Exhibit A, Volume II of Transcript)

On September 9, 1968, the petitioner made a motion for change of venue, which motion is quoted as follows:

> "The defendant, George Lang, moves the Court for a change of venue transferring this action for trial from

this Court to the Circuit Court of Davidson County, Tennessee, or to the Circuit Court of such other county outside of West Tennessee as this Court may direct because this case, the matters involved in this case, other related cases involving this defendant, and this defendant have all been the subject of such wide and voluminous publicity, notoriety and conversation throughout radio, television, newspapers and conversation, the same being so derogatory and prejudicial to this defendant that a fair, impartial and unprejudiced jury and a fair trial cannot be had in this county or in West Tennessee." (R. 3)

The motion, which was disallowed, was heard on September 10, 1968, at which time defendant presented witnesses from the Jackson Sun, The Commercial Appeal (newspapers), WTJS, WDXI, WJAK (radio stations), and WDXI-TV (television station) in his effort to show the publicity and notoriety given to defendant and the charges and accusations against him during July, August and September, 1968.

Much of the publicity and notoriety concerned a police raid that was made on defendant's home on June 30, 1968, during which numerous reels of allegedly "obscene" motion picture film were seized and the prosecution of defendant for possession of same. In that connection, the news media reported, among other things, that on June 30, 1968, defendant's home was raided and he was charged with possessing indecent, lewd and obscene material; that a reel of allegedly "obscene" film was running in a projector in defendant's bedroom; that nine other allegedly "obscene" reels were on the bed in defendant's bedroom and eighty-two more reels found in a chest in the bedroom; that defendant intended to show the films to unidentified persons; that three women were in his home at the time of the raid; and that defendant was bound over to the grand jury

after the General Sessions Judge viewed ten of the seized reels.

The raid of June 30, 1968 and the resulting charges against defendant for possession of allegedly "obscene" motion picture film are matters totally unrelated to the case at bar. (Ex. A, R. 25A, Vol. II)

The news media also reported that a raid was conducted on defendant's home on August 2, 1968, and that a large amount of allegedly obscene books and picture albums were seized; that during the August 2 raid, allegedly obscene material other than that seized was found but not seized because it was not mentioned in the warrant; and that following the raid of August 2, defendant was charged with contributing to the delinquency of a minor.

It was also reported by the news media that on August 2, 1968, the Chancery Court of Madison County, Tennessee, had issued an injunction restraining defendant from "selling, distributing, exhibiting or displaying 'obscene' material."

Some of the news releases made mention that defendant had been convicted and fined in the Circuit Court of Madison County in 1966 for contributing to the delinquency of a minor.

The June 30th, 1968 raid and resulting charges against defendant had nothing whatever to do with the case at bar except that the publicity and notoriety was practically concurrent.

"The Jackson Sun" is a newspaper published in Jackson, Tennessee, and mainly distributed in Madison and adjoining counties. It has a distribution of about 25,000 and reaches about 90% of the homes in Madison County, Tennessee. During July and August of 1968, it carried about six stories concerning defendant and the charges against him. The stories covered generally the subject matter indicated above. (Vol. II, p. 25, Exhibit A).

WTJS is a radio station affiliated with The Jackson Sun, located in Jackson, Tennessee, with primary coverage in Madison County, Tennessee, and adjoining counties. This station carried about the same stories as the Sun and the same number (six). Each story was broadcast about five times, making a total of about thirty broadcasts concerning defendant and the various charges against him. It was estimated that this station reaches thousands of families in the community.

WDXI is a local radio station with primary coverage in Madison (Tennessee) and adjoining counties and its newscasts reach thousands of families. It carried seven stories on defendant and the charges against him from July 1, 1968, to September 5, 1968. These stories were broadcast a total of about 33 times.

WJAK, a local radio station with primary coverage in Madison (Tennessee) and adjoining counties, had only one story on defendant and the chages against him, and it ran five times.

WBBJ-TV is a local television station with primary coverage in Madison (Tennessee) and adjacent counties and its newscasts reach thousands of families in the community. It had six stories during about July and August, 1968, concerning defendant and the charges made against him. Each story was telecast between two and four times.

The "Commercial Appeal", a Memphis, Tennessee, paper with wide circulation in the mid-south, had four stories during about July and August, 1968, concerning defendant and the charges against him.

United Press International, a world-wide wire service, also reported one story concerning defendant.

Most of the reports of the news media took place between July 1, 1968, and September 5, 1968, and covered the matters hereinbefore stated. In all, there were approxi-

mately ten newspaper articles, sixty-eight radio broadcasts, and twelve to twenty-four television broadcasts concerning these matters.

All testifying members of the news media agreed that there had been a lot of talk in the community recently about the defendant and the various charges and accusations made against him.

The defendant feared that he could not have a fair and impartial jury in Madison County, Tennessee, and therefore, he made his motion for a change of venue. Defendant's fears in this regard were indeed founded in fact, as voir dire examination of prospective jurors later revealed. All of the prospective jurors had heard of defendant; four knew that defendant had been previously convicted or had been in trouble before; and seven knew of the June 30 raid on defendant's home and the seizure of allegedly obscene film.

Defense counsel requested that he be allowed to conduct voir dire examination of prospective jurors separately and out of the presence of each other, but this request was denied by the Court. Therefore, after voir dire examination, all jurors knew, among other prejudicial matters, that defendant had been previously convicted and they also knew about the aforesaid raid of June 30, 1968.

Defense counsel exercised all of his challenges and exercised diligence in attempting to secure an impartial jury.

Question I was originally raised during the course of the trial. Defense counsel challenged for cause all prospective jurors who had prior knowledge of defendant's previous conviction. The Court ruled against the defendant. We quote from pages 43 and 44 of the transcript, which is now on file with the Court of Criminal Appeals of Tennessee:

"Mr. Murchison: (Addressing Court at Bench) We would want to — we feel like we are entitled to challenge for cause against individuals who have knowledge of prior convictions on Mr. Lang, and I don't want — I don't know about the procedure. I didn't want to do it and suffer the chance that the Court might overrule me . . . . We would like to state for the record that we think these gentlemen that have prior knowledge of a conviction should be challenged for cause . . . .

"The Court: I doubt that you are entitled to challenge for cause."

Later during the course of jury selection, defense counsel challenged the entire panel for the reasons stated in Question I. We quote from page 58 of the transcript which is on file with the Court of Criminal Appeals of Tennessee:

"Mr. Murchison: We want to challenge the entire petit jury panel, and also the entire panel, because I think it's shown here that all of these people have knowledge of Mr. Lang and have all read about this in the paper, and stated that they have read, each and every one of them has said, that they read where films were confiscated or taken from Mr. Lang's home.

"The films aren't even involved in this case, so it's rather obvious that they are going to know of some of the things that were not even admitted and are not even a part of this case.

"Secondly, of course, in our voir dire we were walking a tightrope, if I can put it that way, about questioning these jurors, particularly about Mr. Lang's prior convictions and I realize, perhaps, I to some degree am responsible for bringing that out, but on the other hand we weren't allowed to cross examine them independently, so I felt I had to ask that question, — Several of them know of previous convictions and that previous conviction is for the same thing as

this charge and — same statute and we think all of these jurors have such knowledge of this case that I just don't think — I believe the entire panel should be challenged and we challege the entire panel and the petit jury.

"The Court: Overruled."

As indicated above, the Court overruled defense counsel's challenge of the entire panel for the reasons stated.

Question I was raised before the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee by defendant's III and IV assignments of error, which we quote as follows:

"III. The Court committed error in refusing to allow defense counsel to challenge for cause those prospective jurors who knew that defendant had been previously convicted (R. 43-44). This was error because a person with prior knowledge could not be a fair and impartial juror, particularly when the previous conviction was for contributing to the delinquency of a minor.

"IV. The Court committed error in refusing to sustain defense counsel's challenge of the entire jury panel because the best efforts of defense counsel to select a fair and impartial jury notwithstanding, of the jurors to serve, four knew that defendant had been previously convicted and seven knew of charges against defendant for the possession of allegedly 'obscene' film, both matters being unrelated to the case at bar." (R. 58-59, 26-60)

At all stages of the proceedings, Question I was resolved against the defendant by the Tennessee Courts.

Question II was first raised during the trial of the case when in the course of jury selection defense counsel requested that he be allowed to conduct voir dire examination of the jurors separately and independent of each other.

This motion was overruled by the Court. We quote as follows from pages 25 and 26 of the transcript which is on file with the Court of Criminal Appeals of Tennessee:

> "Defense counsel moved to be allowed to voir dire the jurors separately and independently and out of the presence of each other; stating that the reason was that some of the questions might, by the nature of them, tend to prejudice the other jurors against the defendant; which motion was overruled by the Court; to which action of the Court the defendant excepted."

Question II was raised upon appeal to the Court of Criminal Appeals of Tennessee and upon Petition for Certiorari filed with the Supreme Court of Tennessee by defendant's II assignment of error, which we quote as follows:

> "II. The Court committed error in refusing to grant defense counsel's request that he be allowed to question the prospective jurors on voir dire examination separately and out of the presence of each other (R. 25 & 26). This was error because questions necessarily asked the separate jurors and their answers, particularly concerning previous and unrelated charges and accusations against defendant and defendant's previous conviction, had a prejudicial effect upon other jurors and prospective jurors who were listening. (R. 26-60)"

In all stages of the State Court proceedings, Question II was resolved against the defendant.

Question III was raised by defendant's motion for a change of venue, which is quoted above, and which motion was overruled after hearing on September 10, 1968. It was again raised in the Trial Court by motion for new trial, (R. 13-15) which was overruled. (R. 19-20) Question III was raised upon appeal to the Court of Criminal

Appeals of Tennessee and upon petition for certiorari filed with the Supreme Court of Tennessee by defendant's assignment of error No. 1, which we quote as follows:

> "1. The Trial Court committed error in overruling and refusing to allow defendant's motion for a change of venue (R. 3 & 11) which motion is quoted as follows:"
>
> > (Quotation of motion omitted in view of the fact that it is quoted above.)
>
> "The Trial Court's ruling in this regard was error because the evidence presented pursuant to said motion and the voir dire examination of prospective jurors sufficiently proved that the matters involved in this case, other cases involving defendant, and the defendant have all been the subject of such wide and voluminous publicity, notoriety and conversation throughout Madison County, the same being so derogatory and prejudicial to defendant that a fair, impartial and unprejudiced jury and a fair trial could not be had and was not had in Madison County. (Ex. A, R. 25A, 26-60)"

At all stages of the proceedings, the Tennessee Courts resolved Question III against defendant.

(b) Facts Primarily Material to Questions IV and V. (R. 69-95, Exhibit 4, R. 163)

Officer Morgan of the Jackson, Tennessee, Police Department, testified that he received information that the defendant had shown some "obscene" comic-type booklets to two young girls. The officer executed an affidavit (Ex. 4, p. 163) and on that basis a search warrant (Ex. 4, p. 163) was issued by the Chancery Court of Madison County purportedly authorizing and directing a search of defendant's home and seizure of obscene "still pictures and

books". The affidavit and search warrant, which speak for themselves, are contained in the record at page 163 and are identified as exhibit 4. On August 2, Officer Morgan and assistants, under authority of the warrant, searched defendant's home, but the search was not limited to the booklets allegedly shown to the children. On the contrary, after the booklets were found, the officers continued to search the entire house for any "still pictures and books", *that the officer considered "obscene"*, whether or not the pictures or books had any relation to offense allegedly committed against the children. Officer Morgan interpreted the warrant as authorizing him to search for and seize any pictures or books that in his judgment were "obscene", whether or not the material was related to any charges against defendant. The officers seized "20 books (comic type), 11 sex books -- 3 photo albums." Only three of the comic-type books were received in evidence as exhibits 1, 2 and 3 and displayed to the jury. None of the other material was alleged to have been shown to the children.

It is undisputed that prior to the issuance of the warrant and the execution of the search and seizure, there was no hearing, adversary or otherwise, upon the issue of whether the material to be searched for and seized was, in fact, "obscene". The defendant was given no notice of the charge against him and was given no notice that the warrant had been issued and the search and seizure carried out until the officers arrived at his home and demanded entrance.

Section 39-3003 of the Tennessee Code Annotated reads as follows:

> "It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with the intent to sell, distribute, display or exhibit; or to pub-

> lish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material. This paragraph shall not be construed to permit the seizure or suppression of any material, obscene or otherwise, such seizure or suppression to be lawful only as expressly provided for by law."

The last phrase, "such seizure or suppression to be lawful only as expressly provided for by law," is obviously referring to Section 39-3005 of the Tennessee Code Annotated, which specifically provides for strict and rigid procedure to be followed in connection with seizure and suppression of obscene material. It is undisputed that the procedure outlined in Section 39-3005 was not followed.

The search warrant in question authorized and directed a search for and seizure of "still pictures and books". The officers assumed that this granted them authority to thoroughly search defendant's home and to seize any material that was "obscene" in the opinion of the officers. After beginning the search of defendant's home, the officers quickly found the booklets allegedly shown to the young girls, but they did not stop there. Instead, they took advantage of the vague and far-reaching description, "still pictures and books", and continued on the search of defendant's home from one end to the other, seizing whatever the officers considered obscene. The officers found and seized "11 sex books – 3 photo albums" for no reason other than that defendant possessed them in his home and the officers considered them "obscene".

The questions designated as IV and V above were first raised during the course of the trial on objection by defense counsel to the admissibility of certain "obscene" booklets allegedly seized from the defendant's home, as above stated. (R. 65-69, 82-89) The grounds for objection at the trial were substantially the same as are now made.

These questions were again raised upon motion for a new trial and particularly ground IV and ground VIII, which are quoted below: (R. 13-15)

> "IV. The Court committed error in allowing the several booklets allegedly exhibited by defendant to the two young girls to be received in evidence and exhibited to the jury because said booklets were obtained by police officers by means of an unlawful and illegal search and seizure and by use of an unlawful, illegal and invalid search warrant, all of which violated the rights guaranteed to this defendant by the Constitution of the United States of America."

> "VIII. The police officers implied by their testimony that upon the questionable search of the defendant's residence they had seized an abundance of material considered by them to be "obscene", in addition to the several booklets which were received in evidence. This other material, as well as the several booklets, was obtained by the police by means of an unlawful and illegal search and seizure and by use of an unlawful, illegal and invalid search warrant, all of which violated the rights guaranteed to this defendant by the Constitution of the State of Tennessee and the Constitution of the United States of America. Defendant therefore contends that he was greatly prejudiced by the implication conveyed to the jury that other 'obscene' material had been seized from the defendant's residence."

These questions were again raised upon appeal to the Court of Criminal Appeals of Tennessee and upon Petition for Certiorari filed with the Supreme Court of Tennessee by the defendant's assignment of error V, which is quoted as follows:

> "The Court committed error in holding that the search warrant (Ex. 4, R. 163) was lawfully and properly issued; in holding that the search of defendant's home

made pursuant thereto was lawful and proper; in allowing testimony concerning the results of the search; and in allowing exhibits 1, 2 and 3 (R. 91-93) which were seized during the search to be received in evidence. The aforesaid search and seizure was unlawful because (a) Section 39-3003 of the Tennessee Code Annotated prohibits a search for and seizure of obscene material except as provided for in Section 39-3005 and the latter section was not complied with; (b) There was no adversary hearing on the "obscene" issue conducted prior to the issuance of the warrant and the execution of the search and seizure; and (c) The 'obscene' material to be searched for and seized was not described in the warrant with reasonable certainty. The prejudice is inherent in the nature of the fruits of the search."

These questions at the Trial Court were resolved against the defendant; the Court of Criminal Appeals affirmed; and the Supreme Court of Tennessee denied certiorari.

(c) Facts primarily material to Question VI.

In a hearing before the Court outside the presence of the jury, the Attorney General asked the defendant —

> "Q. 33. Alright, I'll ask you this. Did you have your walls of your house literally lined with nude pictures of nude women and possibly men?" (R. 191)

Defendant responded —

> "A. None of them were in the office where the children were." (R. 191)

Defendant went on to explain that he had numerous oil paintings and art pictures in the house; that some are nudes, some are abstracts and some are landscapes; and that he had nine paintings of nudes over a 5000 square foot

home. Defendant denied that his home was "literally lined" with nude pictures. (R. 191-192)

There was no contention made by the State that the young girls saw any of the nude paintings or that defendant attempted to show them to the girls. The "nude pictures" referred to by the State's Attorney were not even located in that part of the house allegedly visited by the girls. As a matter of fact, the "nude pictures" were totally unrelated to the case on trial.

The Attorney General's theory of materiality of such an inquiry is reflected by his statement as shown on pages 198-199 of the record:

> "MR. LaFON: The character and type of man and his state of mind and how he looked at sex and things of that sort. This is cross examination and we feel we have a right to go into it just a little bit."

The Trial Court allowed the inquiry, thus in the presence of the jury the following question and answer — (R. 201)

> "Q. 12. Now, Mr. Lang, is it not true that you have a number of nude pictures displayed there in your house?"
>
> "A. Yes sir."

During the trial this inquiry was objected to, as indicated on page 191 of the transcript, which we quote as follows:

> "Q. 33. All right, I'll ask you this. Did you have your walls of your house literally lined with nude pictures of nude women and possibly men?"
>
> MR. MURCHISON: We'll object to that. That is totally immaterial to this case. None of these little girls saw those pictures. There's no testimony to that effect. It has nothing to do with this case.

"THE COURT: Go ahead and answer that question."

We quote further from page 201 of the transcript as follows, which quotation indicates the objection of defense counsel:

"Q. 12. Now, Mr. Lang, is it not true that you have a number of nude pictures displayed there in your house?

"MR. MURCHISON: We're objecting.

"THE COURT: Overruled.

"Q. 13. How many do you have?

"A. Well, I have a number of art pictures, oils and water colors and so forth -- I'd say about, maybe 25 or 30 all total, and I believe nine of them are nudes, but they're not obscene.

"MR. MURCHISON: We'd like to note our exception to this question."

The question was raised on motion for a new trial, and particularly Part VII thereof, which is quoted as follows: (R. 13-15)

"The Court committed error in allowing the Attorney General to inquire of defendant upon cross-examination as to whether defendant had pictures of nudes and other similar pictures in and about his home and in requiring the defendant to answer such inquiry."

The question was raised upon appeal to the Court of Criminal Appeals of Tennessee and upon Petition for Certiorari to the Supreme Court of Tennessee by Assignment of Error Number VI, which is quoted as follows:

"The Court committed error in allowing the State's Attorney to ask the defendant upon cross examination if he (defendant) had a number of 'nude pictures' displayed in his home and in requiring defendant to answer, which answer was necessarily in the affirmative (R. 191-192, 201). This was error because whether or not defendant had 'nude pictures' in his home was a matter wholly unrelated to any issue of the case. Under the circumstances of this case, this was an extremely prejudicial matter."

At all stages of the proceedings the Tennessee Courts have resolved Question VI against defendant.

(d) Facts primarily material to Question VII.

The defendant had been previously convicted of contributing to the delinquency of a minor, but it is undisputed that this conviction is a wholly unrelated matter. This previous conviction took place about three years previous and the facts were materially different, even though defendant had been prosecuted under the same statute for contributing to the delinquency of a minor.

The State's Attorney, upon cross-examination of the defendant, asked the following question:

"Q. 14. Mr. Lang, at a prior time, were you not convicted with the same charge as you're charged here today, contributing to the delinquency of a juvenile?" (R. 201)

Defense counsel objected to the question, as indicated on page 201 of the record, from which we quote as follows:

"MR. MURCHISON: We object, Your Honor, for the reasons stated."

In an out of Court hearing, defense counsel vigorously argued that this was not a proper inquiry because the

offense of contributing to the delinquency of a minor is a misdemeanor, not necessarily involving moral turpitude, not similar to the charges upon which defendant was presently being tried, and a matter wholly unrelated to the case on trial. Defense counsel's objection was overruled and defendant gave the following answer:

> "A. I was convicted of the same charge, however, it was a little bit different. She lacked two weeks of being 18 years of age." (R. 202)

This matter was raised upon Motion for a New Trial, and particularly Part VI thereof, which is quoted as follows: (R. 13-15)

> "The Court committed error in allowing the Attorney General to inquire upon cross examination of defendant as to whether he (defendant) had been previously convicted of contributing to the delinquency of a minor and in allowing the fact that defendant had been previously convicted of contributing to the delinquency of a minor to be brought to the attention of the jury."

The question was raised before the Court of Criminal Appeals of Tennessee and upon Petition for Certiorari filed in the Supreme Court of Tennessee by Assignment of Error No. VII, which is quoted as follows:

> "The Court committed error in allowing the State's Attorney to inquire upon cross examination of defendant as to whether he (defendant) had been previously convicted of contributing to the delinquency of a minor and in allowing the fact that defendant had been so convicted to be brought to the attention of the jury. (R. 192-202) This was error because the prior offense of contributing to the delinquency of a minor is a misdemeanor not necessarily involving moral turpitude and further, this prior offense was wholly unrelated to the issues of the case on trial."

At all stages of the proceedings, the Tennessee Court resolved Question VII against defendant.

We respectfully submit that all of the above facts are substantiated by the transcript on file with the Court of Criminal Appeals of Tennessee.

ARGUMENT

This writ should be allowed for the following reasons:

Questions I, II & III

In selecting the jury, defense counsel exhausted all of his challenges and made every effort to secure a fair and impartial jury but, nevertheless, all of the jurors who served had heard of defendant; four of them knew that defendant had been previously convicted; and seven had heard that defendant had been arrested previously on moral charges and that "obscene" material had been found in his home. The Court refused defense counsel's request to allow him to conduct voir dire examination of prospective jurors separately and out of the presence of each other; and so, after voir dire examination was conducted, all of the jurors knew these things. (R. 26-60)

Even though the jurors had prior knowledge, as aforesaid, the trial court allowed them to serve over the objections of defendant, because the jurors stated that they could and would decide the case fairly and impartially, solely and alone, upon the evidence presented at the trial. Thus, we have the very significant question of whether a juror is competent to serve when he has prior knowledge, highly prejudicial to the defendant, simply because he states that he will decide the case fairly and impartially and solely upon the evidence presented. This is a practice that was followed by the Tennessee Courts and, as far as we

know, has never been passed upon by the Supreme Court of the United States.

We, therefore, submit that this writ should be granted because defendant did not receive a trial before a fair and impartial jury and that the rights of a defendant to an impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the United States under the foregoing circumstances should be clarified.

Further, this question seems to have been decided by the Courts of Tennessee contrary to the rule announced by this Court in *Marshall* v. *United States*, 360 U.S. 310, 3 L. Ed. 1250, 70 S. Ct. 1171. We read the *Marshall* case as holding that where jurors are exposed to information of such a character that it could not be received in evidence because of its prejudicial nature, the defendant is entitled to a new trial. In this case, the defendant was being tried on a morals charge and the jurors had prior knowledge of other and unrelated morals charges against the defendant, which is information that could not be received in evidence upon trial, and they also had prior knowledge of a previous conviction of defendant on a morals charge.

Defendant says further that this Court should decide whether or not a defendant has a right to conduct voir dire examination of jurors separately and out of the presence of each other when the examination of one juror would likely "poison" other jurors. It seems that the case of *Hall* v. *United States* (C. A. Okla. 1968) 396 F. 2d. 428, certiorari denied 89 S. Ct. 462, 393 U. S. 986, 21 L. Ed. 2d. 447, holds that a defendant has such a right. In any event, we submit that this question should be cleared up.

We further submit that it is important for this Court to decide whether the defendant's motion for a change of venue should have been granted in view of the pretrial

publicity, notoriety, and the results of the voir dire examination of prospective jurors. A change of venue is authorized by Tennessee Code Annotated, Section 40-2201 to secure a fair trial.

Question IV

We respectfully submit that Question IV should be resolved by this Court because the action of the Tennessee Court is not in accord with *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 12 L. Ed. 809, 84 S. Ct. 1723 (1964); and *Marcus* v. *Search Warrants of Property*, 367 U.S. 717, 6 L. Ed. 1127, 81 S. Ct. 1708 (1961).

In the case at bar, the police officer made an affidavit upon information to the effect that the defendant had obscene material in his possession in the form of still photographs and books, which he was keeping in his possession for the purpose of contributing to the delinquency of a minor. Based upon this affidavit, the Chancery Court of Madison County, Tennessee, issued a search warrant authorizing and directing police officers to search the defendant's home for obscene still pictures and books and to seize any indecent, lewd, or obscene material being used or possessed for the purpose of committing the offense of contributing to the delinquency of a minor. Pursuant to said warrant, the officers proceeded to the defendant's home and thoroughly searched it and seized all pictures and books that they considered obscene. They seized not only the booklets allegedly shown to the young children, but also seized a mass of other material which they considered obscene.

Prior to the issuance of the warrant and the execution of the search and seizure, there was no hearing, adversary or otherwise, upon the issue of whether or not the material was or was not obscene and no other safeguards were

employed to assure the protection of defendant's rights under the First, Fourth and Fourteenth Amendments to the Constitution of the United States. Further, there was no prior notice to the defendant and the defendant knew nothing about the charges against him or the search warrant until the officers came to his house and demanded entrance.

Upon appeal, the defendant argued that the search was unlawful because there was no hearing prior to the issuance and execution of the search warrant. The Court of Appeals held that *Marcus* and *Books* were inapplicable cases and the Tennessee Courts would limit those Federal cases to situations where action is taken to suppress and remove obscene material from circulation. We respectfully submit that such a limitation would render these cases practically meaningless, because officers could avoid their requirements by charging a particular offense and then seizing the allegedly obscene material "for use as evidence". When confronted with these decisions, the authorities could respond that they were not seizing the material to suppress it or remove it from circulation but, instead, for evidence at the trial to prove a certain offense. And, of course, if the Tennessee Courts have correctly interpreted these cases, they would not be applicable. Of course, once the officers had the material legally in their possession, they could then comply with the requirements of *Books* and *Marcus* and then proceed to suppress the questionable material. We submit that the reason for the safeguards provided by these Federal decisions does not direct itself to the purpose of the search and seizure but, instead, to the delicate question of whether or not the material is or is not, in fact, obscene. In other words, these cases seem to say that before material can be seized because it is obscene, there must be a prior adversary hear-

ing. The particular charge leveled against a defendant would not render the cases inapplicable as long as the material is being seized because it is allegedly obscene.

The Court of Criminal Appeals of Tennessee says further:

> "'The question is one of whether the showing of these booklets to the little girls violated T.C.A. Sec. 37-270, as opposed to the naked issue as to whether they are or were obscene."

In response, we call this Court's attention to the fact that the charges against the defendant have always been, in substance, contributing to the delinquency of minors *by showing them obscene material* (R. 163, 164, Exs. 4 & 5, R. 2) If the word "obscene" or some synonymous word were left out, it would certainly seem that the charge would be insufficient and subject to abatement. The crux of the offense charged is that the defendant displayed *"obscene"* material to minors. Thus, the delicate and difficult question of whether or not the material shown was or was not obscene was present and when that question is present, the aforesaid Federal decisions require an adversary hearing prior to a search and seizure. We, therefore, respectfully submit that the Court of Criminal Appeals has committed error in holding that these Federal decisions are not applicable and, further, the Supreme Court of the State of Tennessee has committed error by refusing to grant certiorari and correct the error.

We respectfully submit that this Court should resolve the question of the scope of *A Quantity of Books* v. *Kansas* and *Marcus* v. *Search Warrants of Property*, because the Courts of Tennessee have rendered a decision which would greatly limit, if not cripple, the effect of those decisions. It does not appear to us from reading these cases that they are limited to situations where action is taken strictly to

suppress and remove obscene material from circulation. We read the cases as applying whenever the obscenity is sue is present.

Section 39-3003 of the Tennessee Code Annotated reads as follows:

> "It shall be a misdemeanor for any persons to knowingly sell, distribute, display, exhibit, possess with the intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material. This paragraph shall not be construed to permit the seizure or suppression of any material, obscene or otherwise, such seizure or suppression to be lawful only as expressly provided for by law."

The last phrase, "such seizure or suppression to be lawful only as expressly provided for by law", is obviously referring to Section 39-3005 of the Tennessee Code Annotated, which specifically provides strict and rigid procedure to be followed in connection with seizure and suppression of obscene material. It is undisputed that the procedure outlined in Section 39-3005 was not followed. Section 39-3005 provides for a hearing prior to the seizure of obscene material. The defendant, therefore, submits that the search warrant and search and seizure was unlawful because Section 39-3003 of the Tennessee Code Annotated prohibits the search for and seizure of obscene material except as provided for in Section 39-3005 and, the latter section was, without dispute, not complied with.

Defendant therefore says that he has been denied due process of law and equal protection of the laws of the State of Tennessee because the State has failed and refused to comply with its own statutes in defendant's case.

Question VI

Question VI should be resolved by this Court because the defendant, we submit has been denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the Courts of Tennessee allowing the State's attorney to bring out upon cross-examination of the defendant that defendant had a number of nude pictures displayed in his home, when this was a matter wholly unrelated to the case on trial, and when the only purpose and effect it could have would be to create prejudice in the minds of the jurors. The State's Attorney defended this inquiry by stating that he was entitled to show "the character and type of man and his state of mind and how he looked at sex and things of this sort." We submit that there is no rule of law in existence which would allow the State's attorney to pursue such a purpose and that the inquiry was obviously to create prejudice in the minds of the jurors, and this purpose was probably accomplished. This was one in a series of things that resulted in this defendant receiving something less than a fair and impartial trial to which he is entitled under the Fourteenth Amendment to the Constitution of the United States.

Question VII

Question VII should be resolved by this Court for much the same reasons as Question VI. The defendant took the witness stand and upon cross examination, the State's attorney asked the defendant if he had been convicted previously of contributing to the delinquency of a minor. Over the objection of the defense counsel, the defendant was forced to answer and his answer was necessarily in the affirmative. We submit that the action of the Court in allowing this question was error because contributing to the delinquency of a minor under Tennessee law is a mis-

demeanor rather than a felony; it is an offense that does not necessarily involve moral turpitude; and it was wholly unrelated to the case on trial. The only purpose of the inquiry was to create prejudice in the minds of the jurors against the defendant. This was a particularly prejudicial matter to the defendant, under the circumstances of this case, because he was charged with contributing to the delinquency of minors by showing them obscene booklets, certainly a very sensitive matter. The State was allowed to bring out that defendant had previously been convicted on the same charge, but no facts were brought out concerning the previous conviction except that the female involved was almost eighteen years of age. The prejudice to the defendant is aggravated by the nature of the previous offense, that is, contributing to the delinquency of a minor, because this charge could cover a vast multitude of wrongs. What did the defendant do that brought about this previous conviction? As far as the record is concerned, no one knows. But the jury in this case knew that the defendant was being tried for showing obscene material to young girls and there was evidence that he was guilty. When the jury learned that he had been previously convicted of contributing to the delinquency of a minor, they would be inclined to assume that he had done this sort of thing before. The fact is that the previous offense of which defendant was found guilty several years ago was in no way similar but defendant was forbidden by the Court to show the circumstances of the former case, except to show that the girl was almost eighteen years of age. By allowing the jury to be informed that the defendant had been previously convicted of contributing to the delinquency of a minor, without more, actually contributed a false impression with the jury, much to his prejudice. We submit the action of the Trial Court in allowing this previous conviction to be brought to the attention of

the jury was error and was one of several errors which prevented this defendant from receiving a fair and impartial trial to which he is entitled under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

PREMISES CONSIDERED, PETITIONER PRAYS

1. That a writ of certiorari, for which this is the first application, issue from this Court to the Supreme Court of Tennessee and the Court of Criminal Appeals of Tennessee, directing said Courts and the Clerks thereof to certify and transmit to this Court the entire record of the proceedings in this cause, including the opinions and judgments of the Supreme Court of Tennessee and Court of Criminal Appeals of Tennessee.

2. That this case be placed upon the docket of this Court for argument, and that the judgment of the Court of Criminal Appeals of Tennessee, affirming the conviction of the defendant, and the judgment of the Supreme Court of Tennessee denying certiorari be reviewed and reversed and that the errors complained of by petitioner herein be corrected by this Honorable Court.

3. That the petitioner have such other, further and general relief to which he is entitled.

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APPENDIX

(EXHIBIT A)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE, JACKSON

GEORGE LANG
Plaintiff in Error
v.
STATE OF TENNESSEE
Defendant in Error

No. 4
Madison County
Hon. Andrew T. Taylor, Judge

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OPINION FILED: March 23, 1970

AFFIRMED
Robert K. Dwyer, Judge

OPINION

George Lang was convicted of contributing to the delinquency of a minor by a jury in the Circuit Court of Madison County. The punishment imposed was a fine of $1,000 and confinement for 11 months and 29 days in the Madison County Jail. Judgment was duly pronounced and entered by the court on the verdict returned. The defendant has seasonably perfected his appeal. He is and was represented by privately retained counsel.

He has assigned errors committed in the trial court which he contends invalidate the judgment entered.

The facts revealed in the record reflect that two little girls, ages nine and ten, were in the defendant's home. They had been playing with the defendant's daughter in the neighborhood. While in the office part of the home, the defendant showed the little girls comic-type booklets depicting male and female in various and sundry forms of intercourse and sexual activity. In due course, knowledge of this act was received by the police of the City of Jackson. They obtained a search warrant, entered the office part of the residence and recovered out of a desk drawer several of these comic-type booklets. The defendant testified and denied the accusations, explaining the booklets had been in the desk drawer for years.

It further appears from the record defendant had been convicted before in Jackson of contributing to the delinquency of a minor. At the time of trial there were other charges pending against the defendant.

The defendant's first assignment of error complains of the trial court not granting his motion for a change of venue. In support of his motion he called several news media representatives who, in substance, related there had been news articles about defendant's arrests in the newspapers, television and radio. None of these witnesses called

testified or were asked if they thought defendant could not get a fair trial in Madison County. Some were of the opinion that defendant's case had received "run-of-the-mill" coverage. There were and are exhibits of newspaper articles to be found in the record. Most appeared to be stories appearing on the inside pages of the newspapers as opposed to "front page" coverage, in the vernacular of the news media. In *Swann* v. *State*, 219 Tenn. 145, 407 S.W. 2d 452, the following language may be found:

> "... that the question of change of venue is one largely within the discretion of the trial judge and there must be a clear abuse of this discretion for the Court to reverse his action. See King v. State, (1892) 91 Tenn. 617, 20 S.W. 169."

We find no abuse of that discretion in the court denying the motion for a change of venue. The assignment of error is therefore overruled.

The next contention of the defendant complains (1) of the court not allowing the defendant to question the jurors separately and out of the presence of one another, (2) of the court not allowing defendant to challenge, for cause, jurors who had knowledge of a prior conviction imposed upon defendant and (3) of the court not allowing defendant to challenge, for cause, jurors who knew there was a charge of possessing obscene material pending against the defendant.

In the brief filed by the attorney general he calls the court's attention to the fact defendant did not raise the above-outlined assignments of error in his motion for a new trial. The defendant, by failing to give the trial court an opportunity to pass on these questions, thereby waives them. Rule 14(5) of the Rules of the Supreme Court, duly adopted by order of this court July 6, 1967. Nevertheless, in examining the record we find that the

prior conviction complained of was brought out by the defense in the voir dire examination. The court inquired of the jurors and instructed them they were not to base their judgment upon anything other than what was proven in the trial. The court satisfied itself with the fact, from its questions, that the jurors would give the defendant a fair and impartial hearing. The pending charge was also brought out during the voir dire examination conducted by the defense. We are satisfied that the jurors met the test as required by T.C.A., Section 40-2507. The petit jurors all related they had knowledge of the defendant obtained by talk, radio and television coverage. They also had read some of the articles that had appeared in the different newspapers. All stated they could and would give defendant a fair and impartial trial. We further feel the court did not abuse its discretion in not allowing the jurors to be interrogated separately and individually. The assignments of error are accordingly overruled.

Defendant next contends that the court erred in allowing into evidence the sexual-type comic booklets, in that the provisions of T.C.A., Section 39-3005 were not complied with in that (1) no adversary hearing was held before the search (2) there was no hearing on whether the questioned material was obscene and (3) the subject matter basis for the search warrant was not described with reasonable certainty. The defendant further cites in support of his contentions *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, 12 L.Ed. 809, 84 S.Ct. 1723 (1964); *Marcus* v. *Search Warrants of Property*, 367 U.S. 717, 6 L.Ed. 1127, 81 S.Ct. 1708, (1961); *Metzger* v. *Percy*, 393 F.2d 202; and *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed. 542, 89 S.Ct. 1243. We first, in considering these assignments, hold that the provisions of T.C.A., Section 39-3003, *et seq.*, do not apply to the facts and circumstances proven

in this record. The determinative question resolved by the trial court is not whether the sexual type comic booklets were to be suppressed and removed from circulation; but, the question is one of whether the showing of these booklets to the little girls violated T.C.A., Section 37-270, as opposed to the naked issue of whether they are or were obscene. This was not an action by a State agency to remove "obscene" literature from circulation. We hold under this record the showing of the booklets, as found to be so by the verdict of the jury, to be an act contributing to the delinquency of a child, as proscribed by T.C.A., Section 37-270. We, therefore, conclude that *Stanley* v. *Georgia, supra*, is not in point in this record. We are not concerned with defendant's lawful right, under the holdings of that case, to possess this material. We note in reading *Stanley* v. *Georgia, supra*, the following language may be found at page 1249:

> ". . . For example, there is always the danger that obscene material might fall into the hands of children, . . ."

In a reading of *Marcus* v. *Search Warrants of Property, supra*, and *A Quantity of Copies of Books* v. *Kansas, supra*, the relied upon authorities by defendant, it is our judgment they are not applicable in this record under these facts, it appearing that procedures relied upon by the Kansas authorities and the Missouri authorities stifled the constitutional guarantees of freedom of speech by seizing the publications without a hearing to determine the "obscenity" of the publications seized. As afore related, we are not concerned in this record with procedural matters contained in T.C.A., Section 39-3003, *et seq*. The issue is not whether the booklets involved are obscene, *per se*, but whether the showing of them to the youngsters is an

act contributing to the delinquency of a minor. The officer, under this search warrant, was directed with reasonable certainty to the material found in the desk drawer. It, therefore, meets the requirements under the facts and circumstances of this record of the test enunciated in *Bowling* v. *State*, 219 Tenn. 225, 408 S.W.2d 660.

We also would like to note this was not a situation depending upon the officer's judgment of whether the booklets are or were obscene. It is also noted that he was directed by his information with certainty to where these booklets were located in the desk in the office part of defendant's home and what type booklets they were. We are aware that after finding the booklets the officer confiscated other material which was not introduced into evidence. The description in the search warrant contained the verbage "lewd, indecent and obscene." The officers were searching and found evidence (booklets) which was the basis for the complaint. Further, in viewing these assignments the defendant took the stand and admitted ownership of the booklets. We, therefore, hold he waived his right to complain of an unlawful search. *Walder* v. *United States*, 347 U.S. 62, 74 S.Ct. 354; *Lester* v. *State*, 216 Tenn. 615, 393 S.W.2d 288; *Batchelor* v. *State*, 213 Tenn. 649, 378 S.W.2d 751; *Thompson* v. *Carson*, 186 Tenn. 170, 208 S.W.2d 1019; *Hood* v. *State*, 148 Tenn. 265, 255 S.W.2d 51. The assignments of error are accordingly overruled.

Defendant next complains of the court's error in allowing on cross-examination the attorney general to ask about nude pictures on the walls in defendant's home. In view of the charge and one of the little girls testifying she had been all through the home of the defendant, we feel this was not an improper question under the circumstances of the record. We further view the cross-examination of

the defendant about a prior conviction for contributing to the delinquency of a minor not to be improper under the circumstances. It would be impeaching, to say the least, when defendant testified on direct examination he would and never did anything improper to them or any other children. The following language may be found in 3 Wharton Evid. 296, Section 891 (12 ed. 1955):

> "The accused may be cross-examined for the purpose of impeachment by questions which tend to impeach his credibility, by inquiry as to prior contradictory statements, as to matters relating to his memory, motives, history, past conduct, and other matters, affecting his credibility, or as to any specific fact tending to disgrace, degrade, or incriminate him, or to discredit him or impeach his moral character.
>
> "For this purpose a wide latitude is allowed in the cross-examination."

The assignment of error is overruled.

The defendant further contends the evidence does not support the verdict. The evidence, from our review of this record, amply support the verdict as returned by the jury.

In considering and passing on this assignment of error, we are bound by the rule that a conviction in a criminal case will not be reversed on the facts unless it is shown by the defendant that the evidence preponderates against the verdict and in favor of his innocence. *White* v. *State*, 210 Tenn. 78, 365 S.W.2d 411. The defendant has not carried that burden as required by law. The assignment of error is overruled.

We find no error in the trial court overruling the defendant's motion for a new trial filed in this record. His action in doing so approves the verdict as returned by the jury.

All assignments having been evaluated and found to be devoid of merit, the judgment of the trial court is affirmed.

/s/ ROBERT K. DWYER
Judge

Concur:

/s/ WILLIAM S. RUSSELL
Judge

/s/ JOHN A. MITCHELL
Judge

(EXHIBIT B)

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON

GEORGE LANG

vs.

STATE OF TENNESSEE

No. 4 Madison County

#5160

OFFENSE: CONTRIBUTING TO THE DELINQUENCY OF A CHILD

JUDGMENT

Came the plaintiff in error, GEORGE LANG, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Circuit Court of Madison County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by the Court that the State of Tennessee recover of GEORGE LANG the plaintiff in error, for the use of the County of Madison, the sum of $1,000.00, the fine assessed against George Lang in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Madison County, subject to the lawful rules and regulations thereof, for a term of eleven months 29 days and that after the expiration of the aforesaid term of imprisonment he remain in the custody of the Sheriff of Madison County, until the said fine and costs are paid, secured or worked out in the manner required by law; and this cause is remanded to the Circuit Court of Madison County for the execution of this judgment.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Sheriff by the Clerk of the Court below.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $500.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Madison County.

/s/ ROBERT K. DWYER
/s/ WILLIAM S. RUSSELL
/s/ JOHN A. MITCHELL

8-28-70.

IN THE
SUPREME COURT OF TENNESSEE
AT JACKSON

GEORGE LANG
vs.
STATE OF TENNESSEE

MADISON CRIMINAL.

This cause came on to be heard upon a petition for certiorari and reply thereto, and after full consideration by the Court, the Court is of the opinion that there is no merit in said petition, and the same is accordingly denied at the cost of the petitioner, for which let execution issue. 8-3-70.

(Signatures omitted)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 906

GEORGE LANG,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Court of Criminal Appeals of Tennessee

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Amendment I 2, 4, 14, 17

Amendment IV 2, 4, 14, 15, 17

Amendment VI 2, 3, 17

Amendment XIV 2, 4, 14, 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 906

GEORGE LANG,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Court of Criminal Appeals of Tennessee

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee was entered and filed on March 23, 1970, and is reported as **Lang v. State**, 457 S. W. 2d 882 (Tenn. Crim. App. 1970). A correct copy of this opinion was attached as part of the appendix to the petition in this case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const., amend. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U. S. Const., amend. IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable causes, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. Const., amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

U. S. Const., amend. XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Respondent is dissatisfied with the Petitioner's presentation of the questions involved, and, therefore, pursuant to **Rule 60(3)** of the **Supreme Court Rules**, presents the questions as follows:

(1) Whether the Petitioner was denied his Sixth Amendment right to a trial by an impartial jury when the jury which tried the Petitioner included jurors who had knowledge of the Petitioner's reputation and who had been previously exposed to some adverse publicity regarding the Petitioner, but who had formed no individual opinions with respect to the guilt or innocence of the Petitioner and who had expressed no doubts as to whether they could fairly try the case.

(2) Whether the Petitioner was denied his Sixth Amendment right to a trial by an impartial jury by the refusal of the trial judge to grant the Petitioner's motion for a change of venue, which motion was grounded in contentions of prejudicial pretrial publicity in and around Madison County, Tennessee, shortly before the Petitioner's trial, and by the refusal of the trial judge to allow the Petitioner's counsel to conduct his voir dire examination of prospective jurors separately and out of the presence of each other for the purpose of examining the prospective jurors on matters relating to their exposure to pretrial publicity, notoriety and talk concerning the Petitioner.

(3) Whether the constitutional rights of the Petitioner under the First, Fourth, and Fourteenth Amendments were violated by the issuance of a search warrant for the Petitioner's residence upon affidavit of a police officer made upon information that the Petitioner had shown obscene booklets to two young adolescent girls, and by a search of the Petitioner's residence conducted pursuant to the warrant and seizure therefrom of obscene booklets without a prior adversary hearing on the issue of the obscenity of the materials.

(4) Whether the constitutional rights of the Petitioner under the First, Fourth, and Fourteenth Amendments were violated by a search of the Petitioner's residence pursuant to a search warrant which described the materials to be searched for and seized as obscene still pictures and books and which further described the materials as indecent, lewd, and used for the offense of contributing to the delinquency of a minor.

(5) Whether the Petitioner was denied his Fourteenth Amendment right to due process of law in his trial upon charges of contributing to the delinquency of two children under eighteen years of age by showing them certain lewd and obscene booklets by the action of the trial judge in allowing the State to ask the Petitioner on cross-examination whether he had a number of nude pictures displayed in his home and whether he had been previously convicted of contributing to the delinquency of a minor when these questions related to the testimony offered by the Petitioner on direct examination by defense counsel.

STATEMENT OF THE CASE

The Petitioner, George Lang, was indicted by the Grand Jury of Madison County, Tennessee, on September 4, 1968, for contributing to the deliquency of two chil-

dren by showing them certain lewd and obscene booklets in violation of Section 37-270, Tennessee Code Annotated.

On September 9, 1968, the Petitioner moved for a change of venue on the grounds of alleged pervasive, prejudicial pre-trial publicity given his case by the news media. At the hearing it was established that the Petitioner's case had received some publicity, through both the written and broadcast media, particularly with respect to the search of the Petitioner's home, the seizure of allegedly obscene materials therein, and the preliminary aspects of the Petitioner's case. Witnesses for both the written and broadcast media testified that they had covered the Petitioner's case in stories prepared for their respective media. They testified in the main that the publicity was not excessive for a criminal case although there was a substantial amount of talk about the case in the community. The Petitioner's motion for a change of venue was overruled.

On September 30, 1968, the Petitioner was tried in the Circuit Court of Madison County, Tennessee, before the Honorable Andrew T. Taylor, Judge, and a jury. The Petitioner entered a not guilty plea. On the voir dire examination of the prospective jurors, it developed that all of the jurors ultimately selected had heard of the Petitioner and had learned about some matters involving the Petitioner through the news media. All had stated, however, that they had not formed opinions as to the guilt or innocence of the Petitioner and could give him a fair trial. Those prospective jurors who had formed opinions were challenged for cause.

The evidence adduced at the trial established that three girls—Lynn Montgomery, aged 9; Ann Charlotte Diffee, aged 10; and Linda Kay Looney, aged 11—were visiting the Petitioner's young daughter—Sandra Lang—at the Petitioner's residence at 12 Cherry Place, Jackson, Ten-

nessee. At about 11:30 to 12:00 that day, the young girls were in the Petitioner's office which adjoins the house. The Petitioner offered to show the girls some dirty books if they would promise not to tell anyone. The Petitioner then showed the girls two or three comic booklets, each entitled, "The Adventures of the Fuller Brush Man," and each graphically depicting various acts of sexual intercourse. Lynn Montgomery testified that the Petitioner asked Linda Looney about her menstrual period and also used words she, Lynn Montgomery, was unfamiliar with, including one beginning with the letter "f" and also the term "sexual intercourse." The Petitioner obtained the books from the top right-hand drawer in his desk.

About a week later Lynn Montgomery told Ann Diffee's fourteen-year-old brother about the incident. Later the parents heard about it and questioned the girls who related the truth to them. A complaint warrant was obtained against the Petitioner. On the basis of an affidavit of Lt. Roy Morgan of the Jackson Police Department, a search warrant was issued by Chancellor McLemore for the search of the Petitioner's home at 12 Cherry Place in Jackson, Tennessee, for the search and seizure of obscene materials, to wit: still pictures and books. An original and two copies of the warrant were made. One copy was left with the Chancellor, and the police then went to 12 Cherry Place with the original and the other copy. The Petitioner arrived about five minutes after the police who had been waiting for him before commencing the search, and the search warrant was served on him. A copy of the warrant was left with the Petitioner, and a search was then commenced. The first area searched was the top right-hand drawer of the Petitioner's desk. A packet of ten obscene booklets bound with a rubber band was found therein. The search continued, and additional obscene materials were found, including comic booklets,

sex books, and photo albums. At the conclusion of the search, the original search warrant was returned to the Chancellor and the copy which was left with him was placed in the police files. Some of the booklets found in the drawer of the Petitioner's desk were later identified by the girls as the booklets shown them by the Petitioner. Only the booklets found in the desk drawer were introduced into evidence.

The Petitioner took the witness stand and testified in his own behalf. He denied showing obscene booklets to the girls, denied asking Linda Kay Looney about her menstrual period, and denied using an obscene word beginning with the letter "f." Although admitting that the obscene booklets were found in his desk drawer, the Petitioner said that he had forgotten that he had put them there three years ago when given them by a salesman. The Petitioner theorized that the girls had found the booklets while looking through the drawers of his desk, and had looked at two or three of them. To avoid punishment when confronted with this, the girls said that he, the Petitioner, showed them the booklets. The Petitioner had found one of the girls looking through his secretary's desk on a prior occasion. He stated that he had frequent trouble with children coming onto his property because of the unusual nature of his house and yard which are attractive to children, that he attempted to prevent children from coming into his house, and that he never showed obscene material to children. The Petitioner admitted on cross-examination that he had a number of paintings in his house, nine of which were of nudes. He further admitted that he had a previous conviction for contributing to the delinquency of a minor, but that the girl involved therein was nearly eighteen years old.

After hearing all the evidence adduced in the case and upon receiving instructions from the trial judge, the jury

deliberated and returned a verdict of guilty and fixed the Petitioner's punishment at a fine of $1,000 and confinement in the county jail for a period of eleven (11) months and twenty nine (29) days. The Petitioner was sentenced in accordance with the jury's verdict and upon the overruling of the Petitioner's motion for a new trial. The Petitioner prayed for, was granted and duly perfected an appeal in error to the Court of Criminal Appeals of Tennessee, assigning numerous alleged errors, including those errors assigned as constitutional errors in the questions presented by his petition. The Court of Criminal Appeals of Tennessee, in an opinion filed on March 23, 1970, affirmed the judgment of the trial court and upheld the Petitioner's conviction. On August 3, 1970, the Supreme Court of Tennessee denied, without written opinion, the Petitioner's Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Criminal Appeals of Tennessee entered March 23, 1970.

ARGUMENT

I

The Petitioner Was Not Denied His Sixth Amendment Right to a Trial by an Impartial Jury. The Members of the Jury Which Tried the Petitioner Had Formed No Individual Opinions as to the Petitioner's Guilt or Innocence and Had Expressed No Doubts That They Could Fairly Try the Case.

Respondent submits that the Petitioner was tried before a fair and impartial jury. While the individual jurors all related that they had prior knowledge of the Petitioner, all of the jurors had passed the juror qualification tests of Section 40-2307, Tennessee Code Annotated, which are designed to insure a fair and impartial jury. Those prospective jurors who had formed disqualifying opinions as to the guilt or innocence of the Petitioner or who had expressed doubt as to whether they could fairly try the case were excused for cause. It is well-settled in Tennessee that a juror is not disqualified merely because he has been exposed to some publicity regarding the parties in a case, or even if he has formed an opinion, if that opinion is not fixed or such as would require evidence to overcome. See, e. g., **Warden v. State**, 214 Tenn. 398, 381 S. W. 2d 247 (1964); **Smith v. State**, 205 Tenn. 502, 327 S. W. 2d 308 (1959), **cert. den.** 361 U. S. 930; **Manning v. State**, 155 Tenn. 266, 292 S. W. 451 (1926); **Woods v. State**, 99 Tenn. 182, 41 S. W. 811 (1897). Respondent respectfully submits that the right of the Petitioner to a trial by an impartial jury, as guaranteed by the Sixth Amendment, was fully observed through application of the aforesaid Tennessee tests for juror qualification.

II

The Pretrial Publicity Given the Petitioner's Case by the News Media Was Not of Sufficient Pervasiveness or Intensity as to Cause Inherent Juror Prejudice and Partiality. Thus, the Refusal of the Trial Judge to Grant the Petitioner a Change of Venue and to Permit the Petitioner's Counsel to Conduct His Voir Dire Examination of the Prospective Jurors Separately and Out of the Presence of Each Other Did Not Violate the Petitioner's Rights Under the Sixth and Fourteenth Amendments.

Respondent submits that although certain aspects of the Petitioner's case had been covered by the news media through news stories disseminated through the written and broadcast media, the coverage given was neither pervasive nor intense. While the area covered by the effective range of the media involved was relatively large, the news stories themselves were not lengthy, were not given particular prominence or emphasis, and evidenced little editorialization.

In an era of rapid communication through diverse media, it is difficult to insulate prospective jurors from the circumstances attending criminal cases when news media exercise their legitimate prerogative of reporting news incidents as they occur. This function of the news media was recognized by this Honorable Court in **Irvin v. Dowd**, 366 U. S. 717 (1961):

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly

> true in criminal cases. To hold that the mere existence of any preconceived notion as to guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." 366 U. S. at 722-723.

It is only where pretrial publicity has so pervaded the community as to make juror prejudice inherent as a matter of law that fundamental fairness precludes a trial before a jury drawn from the same community. **Rideau v. Louisiana**, 373 U. S. 723 (1963).

The **Rideau** case provides an example of prejudicial pretrial publicity causing inherent juror prejudice as a matter of law. There the defendant was apprehended in connection with a bank robbery which also involved a kidnapping and a murder. A sound film of the defendant's interrogation by the sheriff, wherein the defendant admitted his participation in the crimes, was broadcast over television three different times to an estimated audience of 97,000 persons in a community of 150,000. The Court in **Rideau** said:

> ". . . we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed **repeatedly and in depth** to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." (Emphasis supplied.) 373 U. S. at 726.

Respondent respectfully contends that the pretrial publicity given the Petitioner by the news media fell far short of that given the defendant in **Rideau v. Louisiana**,

373 U. S. 723 (1963). While the dissemination of the Petitioner's coverage was such as to reach a relatively large number of people, the substance of the news material did not reach "in depth" proportions nor was such prominence given the news material as to attract more than incidental attention.

For these reasons, the Respondent respectfully submits that the protection of the Petitioner's constitutional rights under the Sixth and Fourteenth Amendments did not require that the trial judge grant a change of venue or permit the Petitioner's counsel separately to question prospective jurors on voir dire examination regarding their exposure to the pretrial publicity.

III

The First, Fourth and Fourteenth Amendments Do Not Require the Holding of an Adversary Hearing to Determine Whether Materials Are Obscene Before a Search Warrant Is Issued for Such Materials Where There Is Probable Cause to Believe That the Materials Were Used as Instrumentalities in the Criminal Offense of Contributing to the Delinquency of Minor Children.

At the outset, Respondent recognizes the holdings of this Honorable Court in **A Quantity of Books v. Kansas**, 378 U. S. 205 (1964), and **Marcus v. Search Warrants of Property**, 367 U. S. 717 (1961), which applied First Amendment protections to the seizure of obscene materials. These cases involved seizures of materials for the purpose of suppression and removal from circulation. Due to the constitutional protections of the First Amendment, it was held in **Books** and **Marcus** that before allegedly obscene material is searched for and seized by state authorities, an adversary proceeding on the issue of obscenity is required by the due process provisions of the

Fourteenth Amendment. These decisions found state statutes constitutionally insufficient which failed adequately to safeguard the First Amendment protection given to nonobscene material. Sections 39-3003 and 39-3005, Tennessee Code Annotated, represent a codification of the principles enunciated in the **Books** and **Marcus** holdings. It is the position of the Petitioner that the procedures outlined in Sections 39-3003 and 39-3005, Tennessee Code Annotated, must be followed before any search warrant issued for obscene materials can be legally valid.

Respondent respectfully submits that the Court of Criminal Appeals of Tennessee was correct in holding that the decisions in **A Quantity of Books v. Kansas**, 378 U. S. 205 (1964), and **Marcus v. Search Warrants of Property**, 367 U. S. 717 (1961), and the procedures contained in Sections 39-3003 and 39-3005, Tennessee Code Annotated, were not applicable to the issuance of the search warrant for the Petitioner's residence. The search in the instant case was not an action by a state agency to suppress or remove from circulation "obscene" materials, nor did it involve the Petitioner's right to possess such materials under **Stanley v. Georgia**, 394 U. S. 557 (1969). Rather, the question was whether the showing of the materials to young, adolescent girls constituted an act of contributing to the delinquency of a child in violation of Section 37-270, Tennessee Code Annotated. Thus, the materials in question, even if not legally obscene, were the proper subjects of a search warrant if probable cause were shown that the materials were used in a manner to contribute to the delinquency of children. In this respect Respondent respectfully contends that the booklets seized pursuant to a search of the Petitioner's residence are in no wise different from instrumentalities used in the commission of other crimes. Accordingly, Respondent respectfully submits that the issuance of a search warrant by a magistrate

based on a showing of probable cause supported by affidavit were the proper procedures to be followed in the instant case and in no way violated the Petitioner's rights under the First, Fourth or Fourteenth Amendments.

IV

The Subject Matter of the Search Warrant for the Petitioner's Residence Was Described With Sufficient Particularity to Meet the Requirements of the Fourth Amendment.

The search warrant issued for the Petitioner's residence described the material to be searched for as "obscene materials . . . to wit: still pictures and books." The materials were further described as "indecent," "lewd," and "being used for the offense of contributing to the delinquency of a minor." The Petitioner contends that this description was too vague, leaving much to the individual discretion of the searching officer. As indicative of the vagueness of the description, the Petitioner points to the scope of the search which resulted in the seizure of a substantial quantity of allegedly obscene materials in violation of his rights under the First Amendment. **Stanley v. Georgia**, 394 U. S. 557 (1969).

Respondent respectfully submits that the description in the search warrant should not be tested by the degree of particularity required when obscene material is seized for suppressive purposes, **Marcus v. Search Warrants of Property**, 367 U. S. 717 (1961), but rather by the degree of particularity required to enable an officer executing the warrant to identify the property with reasonable certainty from the face of the warrant without other information. Such a test meets the requirements of the State of Tennessee regarding descriptions in search warrants, **Bowling v. State**, 219 Tenn. 224, 408 S. W. 2d 660 (1966), and

comports with the specificity requirements of the Fourth Amendment.

Respondent observes that the searching officer had little difficulty in locating the booklets which were shown to the young girls. The booklets were found immediately in a drawer of the Petitioner's desk. There can be little doubt that the booklets contained still pictures which were obscene, indecent, and lewd. Moreover, such a description was deduced from the information received from the young, adolescent girls who were the victims of the crime and who would likely be unable to provide a more detailed description of the materials shown to them by the Petitioner. Thus, Respondent respectfully submits that not only was the subject matter of the search warrant described with sufficient particularity to meet the requirements of the Fourth Amendment, but also was the most particular description available under the circumstances, considering the age and immaturity of the girls who provided the information on the materials.

V

The Petitioner's Right to Due Process of Law Under the Fourteenth Amendment Was Not Violated by the Discretionary Refusal of the Trial Judge to Curtail the Cross-Examination of the Petitioner When the Questions Asked by the State Related to the Direct Testimony of the Petitioner.

In Tennessee, wide latitude is given to the scope of cross-examination, which is largely a matter within the discretion of the trial judge. Absent an evident abuse of discretion, which would constitute a denial of due process, an appellate court will not interfere with the exercise of that discretion. *E. g.*, **State v. Fowler**, 213 Tenn. 239, 373 S. W. 2d 460 (1962); **Davis v. Wicker**, 206 Tenn. 403, 333 S. W. 2d 921 (1960).

Respondent respectfully submits that the Court of Criminal Appeals of Tennessee was correct in sustaining the action of the trial judge in permitting the State to ask the Petitioner on cross-examination whether he had nude pictures displayed in his home and whether he had been previously convicted of contributing to the delinquency of a minor. No abuse of discretion by the trial judge was revealed in the record.

With respect to the question regarding the nude pictures displayed in the Petitioner's home, Respondent contends that this testimony bore a relationship to the testimony given by the Petitioner on direct examination. Specifically, the Petitioner asserted in his direct testimony that his unusual house and yard were attractive to children; that he attempted to keep children out of his house; and that he never showed obscene material to children. By comparison, one of the young victims testified that on a prior occasion she had been all the way through the Petitioner's house, including the bedrooms. Thus, the nude painting testimony tended to contradict the Petitioner's prior testimony regarding his implied efforts to insulate neighborhood children from potentially improper materials.

With respect to the question concerning a prior conviction for the crime of contributing to the delinquency of a minor, Respondent contends that this testimony also related to the Petitioner's direct testimony wherein he stated that he never did anything to corrupt the victims or any other children. The fact that he did contribute to the delinquency of a minor before tended to impeach the Petitioner's credibility.

Thus, Respondent respectfully submits that the Petitioner's right to due process of law was not violated in any manner during his cross-examination by the State.

CONCLUSION

Respondent submits that in the instant case the Petitioner has failed to show that his federal constitutional rights under the First, Fourth, Sixth and Fourteenth Amendments were in any wise violated or that the questions herein involved are substantial or of broad national concern. Rather, Respondent submits that the Petitioner received a fair and impartial trial wherein his constitutional rights were observed.

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted

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